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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. ~~923~~ 97

THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.,
Appellants,

v.

BOSTON AND MAINE RAILROAD, ET AL.,
Appellees.

No. ~~924~~ 98

MARYLAND PORT AUTHORITY, ET AL.,
Appellants,

v.

BOSTON AND MAINE RAILROAD, ET AL.,
Appellees.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

REPLY TO MOTION TO AFFIRM

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I.

Background and Nature of Proceeding

Under this subtitle two statements are made in the appellees' motion to affirm which require correction:

(1) At page 3 it is said that "beginning in the early 1920's and extending to about 1935, ocean rates to and from the different ports gradually were equalized and the total transportation charge through the northern tier ports conse-

quently became higher than the combined cost of rail and ocean transportation through a southern tier port." The clear implication of this statement, which is taken directly from the opinion of the District Court, is that until 1920 the ocean rates to the northern tier ports were lower than to the southern tier ports by an amount equal to the differential, and that beginning in 1920 a gradual equalization of ocean rates took place which was completed in 1935.

This is simply not true. The fact is that as early as 1898 the Commission found that the rates to the ports of New York, Baltimore and Philadelphia had been equalized insofar as full cargoes of grain were concerned. At that time the Commission also found that the rates on parcel lots of grain had been adjusted so that the difference in favor of New York was substantially less than the amount of the differential. *New York Produce Exchange v. B. & O. R. Co.*, 7 I.C.C. 612, 626, 630.

Again, in 1905 the Commission specifically found that the difference in ocean rates to the affected ports was less than the differential. In *In the Matter of Differential Freight Rates to and from North Atlantic Ports*, 11 I.C.C. 13, the Commission said, at p. 24:

> "We are satisfied that the difference is materially less in case of low-class traffic, which is mainly competitive, than the amount of the differentials, and that is about all that can be averred with certainty."

and at p. 67:

> "While, however, it would be impossible to secure by the application of any inland differential the same rate through all the ports it would be possible to say with confidence that if this were the proper basis of making the differential the present differentials are too high, for they undoubtedly exceed the difference in ocean rates. In our opinion they always have from

the very first. While the Thurman Commission reported that rates from Philadelphia and Baltimore were higher than from New York by an amount substantially equaling the differentials, Mr. Fink, a much closer observer, with much better means of information, stated in his report of 1881 that the difference in ocean rates was only about one-half the differential from Philadelphia, and something more than one cent less than the differential from Baltimore. This Commission found upon the former hearing that the difference in ocean rates did not equal the differentials. We have now expressed the belief in our finding of fa[illegible] that for the last seven years the difference in ocean rates has been materially less than the differentials. During all this time the inland differential has been in effect and for the last two or three years it has been strictly observed. It must follow, therefore, that the rate through Baltimore and Philadelphia has been distinctly lower than the rate through New York."

In *Maritime Asso.; Boston Chamber of Commerce v. Ann Arbor R. Company, et al*, 95 I.C.C. 539 (1925), the Commission was asked by the Boston port interests to require the railroads to reduce to the Baltimore level the rates from Central Territory to Boston. The Commission said, at page 555:

"It does not appear that Boston now gains any advantage whatever by reason of its shorter ocean route or that Philadelphia or Baltimore suffers any disadvantage by reason of its longer route."

In all of these cases the Commission refused to disturb the differential rate structure which had been established by voluntary action of the carriers, although it clearly appeared that the then existing differentials were greater than any inequality in ocean rates.

(2) On page 3 of the motion to affirm, the appellees present certain tonnage figures which again are taken directly from the opinion of the District Court and which purport

to show that traffic has been diverted from the northern tier ports to the southern tier ports as a result of the differentials. The District Court ignored the fact that the Commission had found expressly to the contrary.

The Commission first made a study of the movement of traffic through the ports which it summarized in tables attached to its original report (311 I.C.C. 747-51, App. pp. 79-83). The Commission then found that

> "Nothing in these data suggests that any decline experienced by the northern tier port group or by New York in their percentage participation in such exports was due to an increase in the participation of the southern tier ports." (311 I.C.C. 704, App. 21).
>
> * * *
>
> "These tables show that New York *handled more tonnage of all commodities than any of the southern tier ports;* excluding petroleum, coal, and iron ore, it handled nearly as much as those ports combined; and it handled about sixty per cent more general cargo exports and imports than those ports combined." (311 I.C.C. 706, App. 23) [Emphasis supplied].

On page 4 of the motion to affirm, appellees cite other tonnage figures taken from the opinion of the District Court. They obscure the unquestioned position of New York as "the world's greatest port," with an enormous hinterland that the southern tier ports do not have, and its "complete dominance," as found by the Commission, in the handling of general cargo to and from differential territory, despite longer distances and much higher transportation costs. The larger tonnage figures of the southern tier ports reflect bulk commodities, principally grain and import ores, moving to and from differential territory where, as found by the Commission, these ports have their natural market because of shorter distances and lower costs.

To place these figures in perspective, the Court should read the careful and thorough analysis of the movement and consist of the traffic through the ports and of the movement by rail to Central Territory which is to be found in the Commission's original report (311 I.C.C. 706-714, App. pp. 24-34).

II.

The Appellees Ignore the Real Issue in the Case

The motion to affirm argues that the order of the Commission was based primarily on a finding that the rates filed by the northern tier carriers violated Section 3(1) of the Act because of differences of distance and cost of service. But it is clear that these differences were not the sole basis of the Commission's order which the District Court has set aside. The issue before the Commission was whether the rates to all the North Atlantic ports should be equalized, that is to say, whether the rates to the southern tier ports should be compulsorily maintained at the same level as the rates to the northern tier ports. Stated in other words, the question was whether the southern tier carriers were entitled to maintain the differential which had been in force for so many years.

The northern tier carriers based their claim to parity on the right to compete for export-import traffic. But as the Commission pointed out, the right of the southern tier carriers to compete for this traffic is no less great. After careful analysis of the tonnage statistics and traffic studies showing the movement and consist of the traffic through the ports, of the services available at the respective ports, of testimony of shippers and traffic handlers indicating preference for the northern tier ports, and of the geographic disadvantages and higher cost through them, the Commission concluded that the southern tier carriers could not lawfully be prevented from availing themselves of their

lower costs by lowering their rates so as to maintain a differential. Such being the case, the Commission held that no useful purpose would be served by permitting the northern tier carriers to file lower rates which would immediately be met by matching reductions, thus resulting in a useless dissipation of carrier revenues. It follows that cases such as *U. S. v. Chicago, M., St. P. & P. R. Co.*, 294 U.S. 499, and *Texas & Pacific Ry. Co. v. U. S.*, 289 U.S. 627, which uphold the right of carriers to disregard distance and cost of service in competing for traffic do not reach the question involved in the present appeals.

At pages 23-25 of the motion to affirm, appellees argue that the matching reductions filed by the southern tier carriers are unlawful because they would result in a rate war. But it is the northern tier carriers which have initiated a rate war. Not satisfied with the lion's share of the most valuable traffic moving through the North Atlantic ports, they seek to take away from the southern tier carriers the only traffic for which they can compete. The southern tier carriers have merely undertaken to defend themselves. The case is thus wholly unlike *U. S. v. Chicago M., St. P. & P. R. Co.*, 294 U.S. 499. There the existing rate relationship was admitted to be "unsound" but the argument was advanced that it could not be changed because a rate war would result. To this argument Mr. Justice CARDOZO replied that the Commission had full power to prevent such a rate war.

In the present case there is no finding by the Commission that the existing rate relationship is "unsound". On the contrary, the Commission has found that "the present differentials have long served to retain a reasonable competitive relationship between the principal port groups and should be maintained." (311 I.C.C. at 741; App. 70). The appellees do not contend that the existing rate differential

structure is unlawful. What they argue is simply that since the northern tier carriers have taken the initiative in filing reduced rates, the southern tier carriers are now precluded from following suit because that would start a rate war.*

This Court should compare the *Milwaukee* case, *supra*, with its sequel, *Ayrshire Collieries Corp. v. United States*, 335 U.S. 573, where the action of the Commission in re-establishing the same differential rate structure which had been upset by this Court in the Milwaukee case was upheld. The Court, speaking through Mr. Justice DOUGLAS, said, at p. 590:

> "The Commission did in this case what the Court pointed out in *United States v. Chicago, M., St. P. & P. R. Co., supra*, it had not done there, viz, it adjudged the fairness of the relation subsisting between Illinois and Indiana rates."

The appellees correctly say that the Commission could prevent retaliatory rate reductions which are unlawful, as in *Export Grain from Buffalo to New York*, 292 I.C.C. 647. In that case the attempt of the southern tier carriers to lower ex-lake grain rates to re-establish a differential was condemned by the Commission on the ground that the carriers had made no showing of any material distance advantage or other transportation condition which would justify a differential. In the present case the Commission has found on substantial evidence that the southern tier carriers have significant transportation advantages and that they cannot effectively compete under parity rates. The cases are thus wholly dissimilar.

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* This perverse reasoning is reminiscent of the famous French couplet:

> "Cet animal est très méchant,
> Quand on l'attaque, il se défend."

See *Oxford Dictionary of Quotations* (2nd ed. 1953), p. 12.

III.

The Cases Cited by Appellees are Inapposite

It is apparent that the appellees proceed upon the assumption that there can be but one lawful rate relationship. But the contrary is clearly implicit from the decision of this Court in *United States v. Chicago, M., St. P. & P. R. Co.*, 294 U.S. 499. (See especially the remarks of Mr. Justice CARDOZO at page 508.) It is conceivable that either parity or a differential might be within the zone of reasonableness and not otherwise prohibited by the statute. However, in this case the Commission has found that a parity relationship would be unduly prejudicial to the southern tier ports in violation of Section 3(1). The District Court held that this finding was without rational basis and in support of that ruling appellees invoke the decision of the Commission in *Baltimore Chamber of Commerce v. Ann Arbor R. Co.*, 159 I.C.C. 691 (1929), the decision of the District Court in *New York Cent. R. Co. v. United States*, 99 F. Supp. 394 (D. Mass. 1951), affirmed 342 U.S. 890, and the decision of this Court in *Texas & Pac. Ry. Co. v. U. S.*, 289 U.S. 627.

In the *Ann Arbor* case, the question was whether all of the carriers serving the North Atlantic ports should be compelled against their will to establish an even greater differential in favor of Baltimore than that which they were voluntarily maintaining. The Baltimore port interests argued that because of New York's higher terminal costs, a higher differential was required. A divided Commission rejected this argument, holding that the existing differentials were adequate.

In the so-called *Ex-Lake Grain Case*, *New York Cent. R. Co. v. United States*, *supra*, no question was presented as to the right of the southern tier carriers to lower their rates

so as to maintain the existing differential. Unlike the case presented on the present record, no matching reductions had been filed by those carriers. Moreover, there was virtually no difference in the distance between the affected ports.

It is true that in *Texas & Pacific Ry. Co. v. U. S., supra*, this Court set aside the action of the Commission in compelling reluctant carriers to establish a differential which gave recognition to the distance advantages of Galveston over competing ports. However, the decision in that case was based primarily on the fact that ports were not localities within the meaning of Section 3(1) of the statute. Mr. Justice STONE, who dissented on behalf of a minority which included Chief Justice HUGHES and Justices BRANDEIS and CARDOZO, said (289 U.S. at p. 656):

> "In holding that the Commission is without power to make the order, the Court does not deny that a discrimination which is produced by charging equal rates for unequal service is prohibited by the statute as much as one resulting from unequal rates for equal service. Compare *The Shreveport Case*, 234 U.S. 342, 346."

Furthermore, the decision in that case led to the prompt amendment of Section 3(1) in 1935, as appears from the legislative history set forth in Appendices 3 and 4 attached to the motion to affirm. The appellees attempt to invoke that legislative history in support of their contention that rates intended to equalize port competition cannot be condemned under Section 3(1). But the plain fact is that the statute was intended to accomplish precisely the opposite purpose. Indeed, the Senate rejected by a vote of 49 to 23 an amendment offered by Senator Long of Louisiana which provided that "where rates and charges of common carriers to ports are made as reductions to equalize rates to ports served by competing carriers, it shall not be termed

undue preference or discrimination." 79 Cong. Rec. 10608; cf. *United States v. Pfitsch*, 256 U.S. 547, 550-552; *United States v. Great Northern Railway Co.*, 287 U.S. 144, 154-155; *Norwegian Nitrogen Prod. Co. v. United States*, 288 U.S. 294, 305-308.

IV.

The Fact that the Commission Found it Unnecessary to Determine whether the Rates, Met All the Requirements of Section 1 Did Not Excuse the Action of the District Court in Making an Original Finding on this Issue.

Because it condemned the proposed equalizing rates under Section 3(1), the Commission found it unnecessary to make findings as to whether they met all the requirements of Section 1, although it did conclude that appellee railroads had not sustained the burden of proving the rates to be compensatory. Accordingly, when the District Court later upset the Commission's decision, it preempted the administrative function, and made its own evaluation of the evidence and its own finding of reasonableness.

Now, in their motion to affirm, the appellees argue:

> "Approval by the reviewing Court of the Commission's refusal to condemn the rates under Section 1(5) can hardly be termed a usurpation by the District Court of a primary function of the Commission."

But, there was no "refusal to condemn the rates under Section 1(5)" on the part of the Commission. Nor was there any such question before the District Court to approve or disapprove. On the contrary, when the District Court overruled the Commission on Section 3(1), a finding as to reasonableness under Section 1 became unavoidable, and this the Court undertook to make itself. The serious mistakes that the Court made in exercising the administrative function are outlined in the jurisdictional statements.

CONCLUSION

The importance of this case to the national economy is not denied. Moreover, it presents questions of interpretation of the Interstate Commerce Act which are of great significance in the administration of this important federal statute. It is also novel, in that it calls for definition of the powers of the Commission in cases where rates are proposed solely for the purpose of imposing an enforced parity. These questions are clearly substantial and it is therefore submitted again that probable jurisdiction should be noted.

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